In the Supreme Court of the United States

OCTOBER TERM, 1951

No. 404

THE COTTMAN COMPANY, A BODY CORPORATE, AND MARYLAND CASUALTY COMPANY, A BODY CORPORATE, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the United States District Court for the District of Maryland (R. 7-14) is not officially reported. The opinion of the United States Court of Appeals for the Fourth Circuit (R. 18-24) is reported at 190 F. 2d 805.

JURISDICTION

The judgment of the Court of Appeals was entered on August 2, 1951 (R. 24). The petition for a writ of certiorari was filed on October 30,

1951. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether Treasury Decision 51584 (11 Fed. Reg. 14511), whereby the Secretary of the Treasury undertook to delegate to the collectors of customs and the Commissioner of Customs his authority under Rev. Stat. 3115 (19 U.S.C. 258) to remit duties assessed under Rev. Stat. 3114 (19 U.S.C. 257), on foreign repairs to vessels, is invalid.

2. Whether petitioners had a right, constitutional or statutory (under Rev. Stat. 3115 or the Administrative Procedure Act), to an administrative hearing on their petition for remission of duties filed under Rev. Stat. 3115.

3. Whether a suit by the Government in the United States district court to recover duties validly assessed under Rev. Stat. 3114, may be dismissed on the ground that the defendants' petition for remission of these duties filed under Rev. Stat. 3115 was improperly denied.

STATUTES AND REGULATIONS INVOLVED

1. Rev. Stat. 3114, as amended (19 U.S.C. 257), provides in pertinent part:

> The equipments, or any part thereof, including boats, purchased for, or the repair parts or materials to be used, or the expenses of repairs made in a foreign country upon a vessel documented under the laws of the United

States to engage in the foreign or coasting trade, or a vessel intended to be employed in such trade, shall, on the first arrival of such vessel in any port of the United States, be liable to entry and the payment of an ad valorem duty of 50 per centum on the cost thereof in such foreign country; * * *

2. Rev. Stat. 3115, as amended (19 U.S.C. 258), provides in pertinent part:

If the owner or master of such vessel furnishes good and sufficient evidence—

(1) That such vessel, while in the regular course of her voyage, was compelled, by stress of weather or other casualty, to put into such foreign port and purchase such equipments, or make such repairs, to secure the safety and seaworthiness of the vessel to enable her to reach her port of destination;

* * * * *

then the Secretary of the Treasury is authorized to remit or refund such duties, and such vessel shall not be liable to forfeiture, * * *

3. 5 U.S.C. 281b(a) provides:

The Secretary of the Treasury is authorized to confer or impose upon the Commissioner of Customs or any of the officers of the Bureau of Customs any of the rights, privileges, powers, or duties, in respect of the importation or entry of merchandise into, or exportation of merchandise from, the United States, vested in or imposed upon the Secretary of the Treas-

ury by the Tariff Act of September 21, 1922 (ch. 356, 42 Stat. 858), or any other law.

4. T.D. 51584 (11 Fed. Reg. 14511) amended the Secretary's general delegation of authority in customs matters to the Commissioner of Customs (T.D. 50192, 5 Fed. Reg. 2573) by further providing:

> Duties accruing under section 3114, Revised Statutes of the United States, as amended by section 466, Tariff Act of 1930, relating to equipment and repairs of vessels, may be remitted or refunded by the collector of customs concerned, under the conditions specified in section 3115, Revised Statutes of the United States, as amended by section 466 of the tariff act, upon the receipt of an appropriate application for relief from such duties, but his refusal to remit or refund any such duties pursuant to a claim for relief under said section 3115, Revised Statutes, shall be subject to review by the Commissioner of Customs upon application therefor. The right and power so to remit or refund such duties is hereby conferred upon the several collectors and their successors in office.

STATEMENT

On May 31, 1946, The Cottman Company, as principal, and the Maryland Casualty Company, as surety, executed a bond (Customs Form 7569) in the amount of $25,000 in favor of the United States (R. 3). One of the conditions of the bond was that The Cottman Company would pay to the

collector of customs at the Port of Baltimore, Maryland, promptly on demand, any duties found legally due the United States from the master or other proper officer or owner of vessels arriving at Baltimore during the period of July 1, 1946, to June 30, 1947, for which The Cottman Company acted as agent (R. 3).

In May 1947, while the bond was still in effect, the S.S. CHATHAM C. LYON, an American vessel owned by Isbrandtsen Co., Inc., for which The Cottman Company acted as agent, arrived at Baltimore (R. 3). The master of the vessel, acting for The Cottman Company, executed an entry of repairs made in foreign countries upon the vessel in the value, in United States money, of $4661.00 (R. 3). The collector of customs at Baltimore assessed the 50 percent *ad valorem* duty, amounting to $2330.50, required by Rev. Stat. 3114 (19 U.S.C. 257, *supra,* pp. 2-3) to be paid on these repairs (R. 3). Petitioners filed a petition, together with supporting letters, for remission or refund of this duty under Rev. Stat. 3115 (19 U.S.C. 258, *supra,* p. 3) on the ground that the repairs were compelled "by stress of weather or other casualty." In accordance with the delegation of the Secretary of the Treasury contained in T.D. 51584 (11 Fed. Reg. 14511, *supra,* p. 4) the petition was acted upon and denied first by the collector of customs at Baltimore and subsequently by the Commissioner of Customs.

Upon petitioners' refusal to pay the assessed duty, the United States filed this suit in the United States District Court for the District of Maryland to collect the amount of the assessed duty (R. 3-4). In their answer, petitioners claimed that they were entitled to a *de novo* hearing in the district court on the merits of their petition for remission (R. 6). In the alternative, they asked that the proceedings be remanded to the Secretary of the Treasury with directions to grant "a true and proper hearing" (R. 6). They claimed that the proceedings on their petition for remission had been improper because, they urged, (1) the Secretary of the Treasury was without authority to delegate the remission power to the Commissioner of Customs and the customs collectors, as he had undertaken to do here; (2) they had not been accorded the oral hearing on the petition, to which they were entitled; and (3) on the merits, the petition should have been granted (R. 6-7).

The district court, pointing to Section 10 of the Administrative Procedure Act (5 U.S.C. 1009), assumed, contrary to the Government's contention, that the court had jurisdiction to pass upon petitioners' claims in regard to the denial of remission. The court then went on to hold (1) that the Secretary of the Treasury's delegation of his authority to remit under Rev. Stat. 3115 was invalid (R. 9-11); and (2) that the Administrative Procedure Act, taken together with Rev. Stat. 3115, re-

quires that hearings conforming to the provisions of the Administrative Procedure Act be held in connection with a decision whether or not to remit these duties (R. 11). The district court, accordingly, entered an order dismissing the complaint, with leave granted to petitioners to proceed in accordance with its opinion (R. 14).

On appeal by the Government, the court below reversed (R. 24). Holding that the district court's rulings in regard to Rev. Stat. 3115 were erroneous, and that in any case, these issues could not properly be raised in a suit by the Government to collect duties assessed under Rev. Stat. 3114, the court below remanded the case to the district court with directions to enter judgment in accordance with the prayer of the complaint (R. 18-24).

ARGUMENT

There is, we submit, no merit to petitioners' claims in regard to the two questions which it basically seeks to raise here:—(1) the validity of the Secretary of the Treasury's delegation to the collectors of customs of the power to remit duties under Rev. Stat. 3115 (19 U.S.C. 258) and (2) the necessity of an administrative hearing, either as a constitutional or statutory matter (under Rev. Stat. 3115 or the Administrative Procedure Act), on Rev. Stat. 3115 petitions for remission. Moreover, these issues may not be raised in a proceeding such as this, where the Govern-

ment is seeking to collect the duties assessed under Rev. Stat. 3114. In these circumstances, the reversal by the court below of the district court's dismissal of the Government's action is clearly correct and review by this Court is unwarranted.

1. *Delegability of Remission Power:* (a). T.D. 51584[1] (*supra,* p. 4) by which the Secretary of the Treasury delegated his power to remit under Rev. Stat. 3115 is, we submit, plainly within 5 U.S.C. 281b(a), *supra,* pp. 3-4, which authorizes the Secretary to

> confer or impose upon the Commissioner of Customs or any of the officers of the Bureau of Customs any of the rights, privileges, powers, or duties, in respect of the importation or entry of merchandise into, or exportation of merchandise from, the United States, vested in or imposed upon the Secretary of the Treasury by the Tariff Act of September 21, 1922 (ch. 356, 42 Stat. 858), or any other law.[2]

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[1] This regulation codified the practice within the Treasury Department dating back at least to 1930 whereby Rev. Stat. 3115 petitions for remission were disposed of within the Bureau of Customs. See, *e.g.*, T.D. 44224 (September 3, 1930); *Customs Regulations* (1931), Art. 127, Par. g; 19 C.F.R. (Cum. Supp.) Section 4.14.

[2] It is noteworthy that although the district court held the delegation invalid, it recognized that action on the petition for remission should be not by the Secretary himself but rather by his "direct representative" (R. 11). Since, as the court below said, "it is manifestly necessary that he delegate duties of this sort to subordinate officials in the Treasury Department * * * there could be no more appropriate delegation of the duty imposed by this statute than to those having charge of the collection of customs" (R. 21-22).

Although the dictionary definition of "merchandise" does not extend to "vessel repairs," Congress used "merchandise" expressly to include the vessel repairs embraced by Rev. Stat. 3115, both before and after the enactment of 5 U.S.C. 281b(a) in 1927. Thus, in Section 498 of the Tariff Act of 1922 (42 Stat. 964) Congress authorized the Secretary of the Treasury to prescribe rules and regulations for the declaration and entry of

> (9) Merchandise within the provisions of sections 465 and 466 of this Act at the first point of arrival.

Since Section 466 of the 1922 Tariff Act amends and reenacts Rev. Stat. 3114 and 3115 (see 42 Stat. 957-958), the plain inference from this provision is that the vessel repairs, etc. dealt with in Rev. Stat. 3115 were, so far as Congress was concerned, to be considered as merchandise for the purpose of the customs laws. This was made explicit in the 1930 Tariff Act, where Congress amended paragraph (9) of Section 498 to read (46 Stat. 728):

> Merchandise within the provisions of sections 465 and 466 of this Act (relating to supplies, repairs, and equipment on vessels and railway cars) at the first port of arrival.

The addition of the language in the parenthesis, expressly referring to repairs and equipment, makes it plain that Congress regarded Rev. Stat. 3115 as dealing with merchandise and, accordingly,

suggests a similar reading of "merchandise" in 5 U.S.C. 281b(a).

This reading of "merchandise" is in accord with the purposes for which Section 281b(a) was enacted. 5 U.S.C. 281b(a) is Section 3(a) of the Customs Reorganization Act of March 3, 1927 (44 Stat. 1381, 1382), which abolished the Division of Customs in the Treasury Department and created in its stead a Bureau of Customs. This reorganization within the Treasury Department was for the purpose, as manifest from its legislative history, of retaining general supervisory authority in the Secretary of the Treasury over customs matters while at the same time relieving him of the requirement of personal action in these matters. The House Committee on Ways and Means, in its report recommending the passage of the proposed legislation (H.R. 10729, 69th Cong.), stated in defining its general purpose (H. Rep. No. 758, 69th Cong., 1st Sess., pp. 1-2):

> The defects of the present system are believed to be many, and among the more important may be mentioned the fact that under the existing organization the Secretary of the Treasury is required to pass upon a multitude of details involving a highly specialized and intricate branch of the law in the course of its administration in the collection of customs duties. *The bill will enable the Secretary to impose this duty upon the commissioner of customs while retaining general supervision*

and control over all customs officials. [Italics supplied] [3]

And in discussing the provisions of the bill, the Committee noted with particular reference to Section 3, the section here involved (*ibid.* pp. 2-3):

> The administration of the existing customs laws is vested directly in the Secretary of the Treasury. *Your committee believes that the secretary should be charged with full responsibility, but that he should be relieved of the necessity of personal action.* Section 3 of the bill authorizes the secretary to confer or impose upon the commissioner of customs, or any of the officers of the bureau of customs, any of the rights, privileges, powers, or duties conferred or imposed upon him in respect of the importation, entry, or exclusion from importation into the United States. [Italics supplied] [4]

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[3] The initial report of the Senate Committee on Finances on the proposed legislation adopted the House Committee's report. See S. Rep. No. 890, 69th Cong., 1st Sess. The Senate Committee's report on recommittal does not refer to this phase of the bill. S. Rep. 1198, 69th Cong., 2d Sess.

[4] Similar comments were made during the House debates on H.R. 10729. For example, in advocating the passage of H. Res. 237, providing for the immediate consideration of H.R. 10729, Rep. Snell, a member of the House Ways and Means Committee, explained (67 Cong. Rec. 8318):

> It has been understood for some time that there is a great need for a change in the carrying out and the enforcement of the custom laws of the country, and that certain detail work that is under present law performed by the Secretary of the Treasury himself should be placed in the hands of some bureau commissioner with authority to act in the place of the Secretary of the Treasury. While the bill does not give any additional powers to the

The validity of the Secretary's delegation is further buttressed by the broad scope of the permissible delegation of authority sanctioned by Section 643 of the Tariff Act of 1930 (46 Stat. 761). That Section, which is entitled "Application of Customs Reorganization Act", provides that "the rights, privileges, powers, and duties vested in or imposed upon the Secretary of the Treasury by this Act[5] shall be subject to the provisions of" 5 U.S.C. 281b(a). Inasmuch as Section 466 of the 1930 Tariff Act deals with Rev. Stat. 3115 (46 Stat. 719), Section 643 indicates that the authority to delegate contained in Section 281b(a) is wide enough to include Rev. Stat. 3115, or at least, so broadens that authority.

Also supporting the delegation is the fact that the Treasury Department, for at least twenty years, has construed Section 281b(a) as permitting delegation of authority under Rev. Stat. 3115 to the customs officials (*supra*, p. 8, fn. 1) and many thousands of cases have been disposed of on the basis of that delegation. Such an adminis-

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Secretary of the Treasury or to anyone in the departments, nor in any way repeals existing law, it does give power to detail such authority to a commissioner of customs.

See, also, 67 Cong. Rec. 8322.

[5] In codifying this provision as 19 U.S.C. 1643, the reference is limited to "this chapter," *i.e.*, Chapter IV, which, since it consists only of 19 U.S.C. 1001-1654, does not include the sections (19 U.S.C. 257, 258) here involved. The original statutory provision is, however, controlling. 1 U.S.C. (Supp. IV) 204(a); *Wong Yang Sung* v. *McGrath*, 339 U.S. 33, fn. 31 on p. 51.

trative construction "is entitled to great weight, 'and such construction is not to be overturned unless clearly wrong, or unless a different construction is plainly required' *United States* v. *Jackson*, 280 U.S. 183, 193;" *United States* v. *Citizens Loan Co.*, 316 U.S. 209, 214; *United States* v. *Madigan*, 300 U.S. 500, 505; *Bowen* v. *Johnston*, 306 U.S. 19, 29-30; *Boske* v. *Comingore*, 177 U.S. 459, 470.

(b). Even if there were a doubt as to the validity of the delegation, the resolution of that question does not have sufficient prospective importance to warrant this Court's review. While Section 1 of Reorganization Plan No. 26 of 1950 (15 Fed. Reg. 4935) transferred, with certain exceptions not here relevant, all functions of all other officials of the Department of the Treasury and all functions of all agencies and employees of such Department to the Secretary of the Treasury, Section 2 empowered the Secretary to delegate these functions to any officer, employe or agency of the Department. Acting under this authority, the Secretary of the Treasury has reaffirmed the delegations in effect prior to the Reorganization Plan. 15 Fed. Reg. 6521.

2. *Requirement of Administrative Hearing:* (a). There is no merit to petitioners' claim that they had a right, constitutional or statutory, to an administrative hearing on their petition for remission. Petitioners' assertion of a constitutional right to a formal administrative hearing is pred-

icated on the claim that their failure to pay the assessment subjects their vessel to possible forfeiture (Pet. pp. 9-10).[6] But this claim confuses Rev. Stat. 3115 with its companion Rev. Stat. 3114. The subjection to possible forfeiture arises not under Rev. Stat. 3115 but rather under Rev. Stat. 3114 pursuant to which the original assessment was made and which, after providing for the assessment, goes on to prescribe:

> * * * and if the owner or master of such vessel shall willfully and knowingly neglect or fail to report, make entry, and pay duties as herein required, such vessel, with her tackle, apparel, and furniture, shall be seized and forfeited. * * *

And whatever constitutional rights to a formal hearing petitioners might have as a result of the assessment, with its concomitant liability to forfeiture, are fully preserved by Congress' provision of review thereof by the Customs Court, the Court of Customs and Patents Appeals and, on certiorari, by this Court. Sections 514 and 515 of the Tariff Act of 1930, 46 Stat. 734, 19 U.S.C. 1514, 1515 (now 28 U.S.C. 1583, 2637), 28 U.S.C. 1541, 1252, 1256. The judicial review so provided is more than ample to protect petitioners' rights, for the Customs Court's review is not limited to

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[6] It should be noted that even the District Court which ruled in favor of petitioners did not hold that they had a constitutional right to a hearing (R. 11).

a determination whether there was sufficient evidence to support the administrative conclusion, as is normally the test in judicial review of administrative actions, but rather extends to a complete *de novo* hearing, with the introduction of new evidence, cross-examination of witnesses, etc., on the validity of the assessment. In short, petitioners' vessel became subject to seizure and forfeiture under Rev. Stat. 3114, not Rev. Stat. 3115 and petitioners' constitutional rights, if any, under Rev. Stat. 3114 are fully protected.

In contrast to Rev. Stat. 3114, Rev. Stat. 3115 does not impose any liability to forfeiture for failure to pay the assessed duty; instead it provides for relief from the possible forfeiture under Rev. Stat. 3114 should the petition for remission be granted. Petitioners have no constitutional right to a hearing on their petition for remission, since they are without a constitutional right to have the duty remitted. Congress has the power under Article I, sec. 8, cl. 1 of the Constitution to require payment of the duty on the imports covered by Rev. Stat. 3114 without reference to how or why the repairs were made, and hence its authorization to the Treasury Department to remit the duty if the prescribed conditions are fulfilled merely constituted an act of "legislative grace." Cf. *New Colonial Co.* v. *Helvering,* 292 U.S. 435, 440; *Helvering* v. *Bankline Oil Co.,* 303 U.S. 362, 366; *Deputy* v. *DuPont,* 308 U.S. 488,

493; *Anderson* v. *Helvering,* 310 U.S. 404, 408; *Interstate Transit Lines* v. *Comm'r,* 319 U.S. 590, 593. Plainly, therefore, petitioners do not have a constitutional right to the remission of the duty, or to a hearing on the denial of remission.

(b) Nor do petitioners have a right under Rev. Stat. 3115 to a formal administrative hearing. Rev. Stat. 3115 authorizes the granting of petitions for remission, not after "hearing on the record" or even "hearing", but rather on "good and sufficient evidence". The pertinent language of Rev. Stat. 3115 is now at least 85 years old, having been enacted into law for the first time in 1866 as part of the original statute which, with amendments, has become the present 19 U.S.C. 258. Act of July 18, 1866, 14 Stat. 184. With the passage of time, the phrase has become encrusted with the definite gloss that no formal hearing was required thereunder. The administrative practice of the Treasury Department for very many years has been to permit applicants for remission to submit written documents in support of their petitions, to hold informal conferences, when requested by the applicants, but to act upon the petition for remission without a formal hearing. Not only has this administrative construction of the phrase not been questioned by anyone, including Congress, but Congress has reenacted Rev. Stat. 3115 on at least two separate occasions (Section 466 of the Tariff Act of 1922, 42 Stat. 957-958;

Section 466 of the Tariff Act of 1930, 46 Stat. 719) without indicating disapproval, and has thereby presumably adopted this construction. See, *e.g.*, *Missouri* v. *Ross*, 299 U.S. 72, 75 and cases there cited; *United States* v. *South Buffalo R. Co.*, 333 U.S. 771; *Apex Hosiery Co.* v. *Leader*, 310 U.S. 469. Thus, it has been firmly settled that formal hearings on petitions for remission are not required as a statutory matter.

(c). In these circumstances, Section 5 of the Administrative Procedure Act relating to hearings is inapplicable. That Section does not by itself give rise to a right to a formal hearing, but together with Sections 7, 8 and 11 of the Act merely provides procedures to be followed in cases where such hearings are provided for either expressly or impliedly by the substantive statutes or, as held in the *Wong Yang Sung* v. *McGrath*, 339 U.S. 33, required as a matter of constitutional right. This is clear from the unambiguous language of Section 5, the introductory clause of which defines the scope of the Section as embracing

> every case of adjudication *required by statute* to be determined on the record after opportunity for an agency hearing. [Italics supplied.]

The legislative history of the Act fully accords with this language by making manifest a Congressional desire to avoid creating a right to a hearing where no such right existed previously. Thus the

Senate Judiciary Committee's Comparative Print of 1945, Sen. Doc. No. 248,[7] pp. 21-22, contains the following statement:

> The introductory clause removes from the operation of sections 5, 7, and 8 all administrative procedures in which *Congress has not required* orders to be made upon a hearing, * * *. Limiting application of the sections to those cases in which statutes require a hearing is particularly significant, because thereby are excluded the great mass of administrative routine as well as pensions, claims, and a variety of similar matters in which Congress has usually intentionally or traditionally refrained from requiring an administrative hearing. [Italics supplied.]

And the same report, in discussing Section 7, specifies that "the provisions of section 7 respecting hearings are not designed to require hearings where Congress has not already done so by statute." Sen. Doc. No. 248, p. 28.[8]

In recognition of the Congressional desire to limit the Section's scope, this Court in holding, in

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[7] Senate Document No. 248 is a compilation of the legislative history of the Administrative Procedure Act. It includes the committee reports, debates and the 1945 hearings before the House Committee on the Judiciary.

[8] See, also, Sen. Doc. No. 248, pp. 202, 226 (Sen. Rep. 752, 79th Cong., 1st Sess.); pp. 247, 260 (H. Rep. 1980, 79th Cong., 2d Sess.); p. 359 (remarks of Rep. Walter, House sponsor of bill); p. 79 (testimony of the Chairman of the American Bar Association's Committee on Administrative Law); cf. Hearings before Senate Committee on Judiciary, on S. 674, 675, 918, 77th Cong., 1st Sess., pp. 1390, 251, 148-149, 791-992.

the *Wong Yang Sung* case, that Section 5 and its companion sections were applicable to hearings which are read into a statute to sustain its constitutionality, carefully pointed out that it did not cover hearings of less than statutory dignity. Mr. Justice Jackson wrote (339 U.S. at 50):

> We think that the limitation to hearings "required by statute" in § 5 of the Administrative Procedure Act exempts from that section's application only those hearings which administrative agencies may hold by regulation, rule, custom, or special dispensation; not those held by compulsion. We do not think the limiting words render the Administrative Procedure Act inapplicable to hearings, the requirement for which has been read into a statute by the Court in order to save the statute from invalidity. They exempt hearings of less than statutory authority, not those of more than statutory authority.

Accordingly, inasmuch as formal hearings on petitions for remission were not held by compulsion, either as a constitutional or statutory matter (see *supra*, pp. 13-19), nor were they even afforded by the Treasury Department by "regulation, rule, custom, or special dispensation" (*Wong Yang Sung* v. *McGrath*, *supra*), petitioners plainly were not entitled to a hearing complying with the requirements of Section 5 of the Administrative Procedure Act.

3. *Jurisdiction:* (a). We have assumed, until now, that the issues sought to be raised by peti-

tioners were properly raised in this proceeding. But the fact is that prior to the enactment of the Administrative Procedure Act,[9] and since 1891, shortly after its creation as the Board of General Appraisers (Section 12 of Customs Administration Act of 1890, 26 Stat. 131, 136),[10] the consistent position of the Customs Court, the court which has exclusive jurisdiction over customs matters generally (see 28 U.S.C. 1583, 1340), has been that courts are without jurisdiction to review denials of remission under Rev. Stat. 3115. This long-established position of the customs tribunals has been based on the ground not that review of a denial of remission under Rev. Stat. 3115 is outside of its jurisdiction as defined in 28 U.S.C. 1583 and its predecessor (*e.g.* 19 U.S.C. 1514) but rather that the determination whether to remit is committed by Rev. Stat. 3115 to the discretion of the Secretary of the Treasury whose decision is final and non-reviewable.[11] As

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[9] We have not been able to find any customs courts decisions rendered since the enactment of the Administrative Procedure Act which involved this question.

[10] The Board of General Appraisers was redesignated as the Customs Court in 1926 (44 Stat. 669).

[11] *Waterman Steamship Corp.* v. *United States*, 30 C.C.P.A. (Customs) 119; *Mills & Gibb* v. *United States*, 8 Ct. of Cust. Apps. 31, T.D. 37164; *Portland California Steamship Co.* v. *United States*, C.D. 889, 13 Cust. Ct. 170; *Lykes Bros.* v. *United States*, C.D. 518, 6 Cust. Ct. 467; *Sullivan* v. *United States*, 44 Treas. Dec. 493; *Hammermill Paper Co.* v. *United States*, 48 Treas. Dec. 269; *J. W. V. Berry* v. *United States*, 57 Treas. Dec. 1067; *M. H. Folger* v. *United States*, T.D. 12305, G.A. 1077; *Pioneer Steamship Co.* v. *United States*, 37 Treas. Dec. 338; *William H. Ellery* v. *United States*, 42 Treas. Dec. 405; *E. E. Kelly & Co.* v. *United States*, 53 Treas. Dec. 1015.

stated in *Portland California Steamship Co.* v. *United States,* 13 Cust. Ct. 170, the most recent decision affirming the non-reviewability of the Treasury Department's action:

> Upon the admission that the duty was levied upon the cost of repairs or equipment, there can be no remission thereof except within the scope of section 3115, as amended, * * *, and there the sole authority for such remission is lodged in the Secretary of the Treasury. His discretion in the matter is not the subject of review. [13 Cust. Ct. at 174.]
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> Section 3115 * * * gives to the Secretary of the Treasury the sole authority within his discretion to remit the duty authorized in section 3114 * * * when in his opinion good and sufficient evidence is presented that the cost was incurred because of certain circumstances. Had Congress desired this court to have jurisdiction in the matter of deciding when duty should be remitted, it easily could have so indicated in the law [13 Cust. Ct. at 175].[12]

Not only have the customs courts since their inception denied the existence of jurisdiction to re-

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[12] In none of the several decisions of the customs tribunals denying to themselves jurisdiction to review petitions for remission has the question of a constitutional right to a hearing on such petition for remission been raised. It may be that the customs court would have jurisdiction to consider such an issue in connection with a petition for remission, if properly raised. See *infra,* fn. 13, pp. 23-24.

view these discretionary decisions of the Treasury Department but, as pointed out in *Waterman Steamship Corp.* v. *United States,* 30 C.C.P.A. (Customs) 119, where the Court of Customs and Patent Appeals reexamined the background of this holding, Congress has presumably approved this abstinence from interference with the Treasury Department's action. Although long before 1922, it had become established, as far as the customs tribunals were concerned, that determinations under Rev. Stat. 3115 were committed to the Treasury's unreviewable discretion, Congress in Section 466 of the Tariff Act of 1922 (42 Stat. 957-958) amended and reenacted Rev. Stat. 3115 without evidencing any disapproval of this construction and without altering the critical language here involved. In addition, although subsequent to the 1922 Act, the customs tribunals continued their reading of Rev. Stat. 3115, Congress again reenacted Rev. Stat. 3115 as part of Section 466 of the Tariff Act of 1930 (46 Stat. 719) without manifesting any disagreement with the customs tribunals and without any changes relevant here. Since "so far as the issues here are concerned, section 3115 * * * [as it now reads] is precisely the same as section 3115 which was a part of section 466 of the Tariff Act of 1922, and is substantially the same as section 3115 of the Revised Statutes as originally enacted in 1866 (R.S. 2d ed. 1878, p. 598), it must be presumed that the construction of [both the original] section 3115 of the Revised Statutes and

[the amended] section 3115 which was a part of section 466 of the Tariff Act of 1922 met with the approval of the Congress. Accordingly, the doctrine of legislative approval of judicial interpretation and construction of the provisions in question is applicable in the instant case. * * *" *Waterman Steamship Corp.* v. *United States, supra,* at 126, see also *supra,* pp. 16-17.

(b). Nor is this absence of jurisdiction to review denials of remission modified in any way by the Administrative Procedure Act. Since determinations on these petitions are within the unreviewable discretion of the Treasury Department, *supra,* pp. 19-23, the Department's action on these petitions plainly constitute "agency action [which] is by law committed to agency discretion" exempt by the introductory language to Section 10 of that Act from the judicial review dealt with in that Section.

Moreover, even if these refusals to remit were not within the agency discretion exemption of APA's Section 10, it would not follow that review may be had in the instant proceeding. In the first place, Congress has provided in the customs courts a special system of courts generally to review customs matters [13] and Section 10(b) of the Adminis-

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[13] *United States* v. *Sherman & Sons Co.*, 237 U.S. 146, 152; *Nichols* v. *United States*, 7 Wall (74 U.S.) 122; *Cottman Co.* v. *Dailey*, 94 F. 2d 85 (C.A. 4); *David L. Moss Co.* v. *United States*, 103 F. 2d 395 (C.C.P.A.); *Riccomini* v. *United States*,

trative Procedure Act permits review by district courts only "in the absence or inadequacy" of "any special statutory review proceeding *relevant to the subject matter in any court specified by statute*" (italics supplied). Inasmuch as the action taken under Rev. Stat. 3115 unquestionably related to a customs matter, it would seem that the review provided by the customs courts constitutes a special statutory proceeding relevant to the subject matter within Section 10(b) and consequently that the review, if any, of these determinations may be by the customs courts.

In the second place, assuming review, if any, were to be available in a district court, rather than the customs courts, such review would not be within the scope of the instant proceeding. This is a suit by the Government to collect the duties which concededly were properly assessed under Rev. Stat. 3114, and even a failure to remit under another statute, Rev. Stat. 3115, does not constitute a defense, "since there has been no remission in any event" (R. 20). "The failure of the Secretary to exercise the discretion vested in him might, in a proper case, serve as the basis for a petition for

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69 F. 2d 480 (C.A. 9); *Boston Wool Trade Assn.* v. *Snyder*, 161 F. 2d 648 (C.A. D.C.); *Patchogue-Plymouth Mills Corp.* v. *Durning*, 101 F. 2d 41 (C.A. 2); *Gulbenkian* v. *United States*, 186 Fed. 133 (C.A. 2). As several of these cases indicate the customs courts have jurisdiction to pass upon constitutional questions raised in proceedings properly before them. See, also, in this connection H. Rep. No. 308, 80th Cong., 1st Sess. ("Revision of Title 28, United States Code") pp. A 105, 141-142.

mandamus against him in a court having power to issue writs of mandamus, but such failure could not possibly constitute a defense to an action in a District Court to collect the duty assessed" (R. 22-23).

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be denied.

PHILIP B. PERLMAN,
Solicitor General.
HOLMES BALDRIDGE,
Assistant Attorney General.
SAMUEL D. SLADE,
MELVIN RICHTER,
Attorneys.

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